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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 19-3; FCC 20-121; FRS 17135]

Reexamination of the Comparative Standards and Procedures for Licensing

Noncommercial Educational Broadcast Stations and Low Power FM Stations

AGENCY: Federal Communications Commission.

ACTION: Dismissal of petition for reconsideration.

SUMMARY: In this document the Federal Communications Commission (Commission) addresses the Petition for Reconsideration (Petition) filed by Discount Legal, regarding the Commission's Report and Order in the Noncommercial Educational (NCE) comparative standards proceeding (*2019 NCE R&O*). The Commission dismisses the Petition as procedurally defective, and alternatively and independently, denies the Petition.

DATES: Request for Petition for Reconsideration of the final rule published at 85 FR 23941 (April 30, 2020). The Commission adopted the Order on Reconsideration dismissing and denying the Petition for Reconsideration on September 1, 2020.

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SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order on Reconsideration (Reconsideration Order) in the NCE comparative standards proceeding, MB Docket No. 19-3, FCC 19-127, released March 20, 2020, published at 85 FR 7880 on February

12, 2020. The full text of the Reconsideration Order is available electronically via the FCC’s Electronic Document Management System (EDOCS) website at http://fjallfoss.fcc.gov/edocs_public/ or via the FCC’s Electronic Comment Filing System (ECFS) website at <http://www.fcc.gov/ecfs>. (Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.) Alternative formats are available for people with disabilities (braille, large print, electronic files, audio format), by sending an e-mail to fcc504@fcc.gov or calling the Commission’s Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

SYNOPSIS

1. *Introduction.* In this Reconsideration Order, the Commission addresses the Petition for Reconsideration filed by Discount Legal seeking reconsideration of the *2019 NCE Report and Order*. The Petition asks the Commission to authorize “secondary grants” in mutually exclusive (MX) FM radio noncommercial educational (NCE) groups, after the initial resolution of the MX applications. The Commission dismisses the Petition as procedurally defective, and alternatively and independently, denies the Petition.

2. *Background.* Conflicting NCE FM applications, which cannot all be granted consistent with the Commission’s technical rules, are considered mutually exclusive. The Commission places conflicting applications into MX groups, resolves the MX groups by applying the NCE comparative procedures, and tentatively selects an application for grant from each separate MX group. Specifically, the Commission compares NCE MX groups under the point system and awards each application a maximum of seven merit points based on public-interest criteria. The application with the most points in an MX group is designated the tentative selectee. The Bureau staff then accepts the tentatively-selected applications for filing, which

triggers a 30-day period for the filing of petitions to deny. Petitions based on claims that the exclusion, or inclusion, of challenged or claimed points could alter the outcome in the particular MX group are referred to the Commission for a new points analysis.

3. When the Commission adopted the point system, it considered and rejected proposals to engage in secondary application analyses, whereby it would reevaluate the unsuccessful applications in an MX group that did not directly conflict with the ultimate tentative selectee of the group. The Commission explained that its primary goal was to select the best qualified applicants in an administratively efficient way.

4. The Commission opened a filing window for new NCE stations in 2007, and in 2010, the Commission issued the first of its comparative points orders resolving MX groups from the 2007 window. In the order, the Commission reiterated its policy “that only one application should be granted out of each mutually exclusive group, while providing the competing applicants the opportunity to file again in the next filing window.”

5. Several dismissed applicants subsequently challenged their dismissals and argued that their applications should also be granted because they were not mutually exclusive with the tentative selectees in their respective MX groups. The Commission again reaffirmed its one-grant policy in three 2015 Memorandum Opinions and Orders, rejecting petitioners’ requests for secondary grants. The Commission explained that its policy basis not to engage in secondary grants was supported by the dual reasons of not granting inferior applications and promoting administrative efficiency.

6. Finally, in the *2019 NCE Report and Order*, the Commission considered and rejected Discount Legal’s suggestion that it adopt a secondary grant practice. The Commission reaffirmed its longstanding one-grant policy. In the Petition, Discount Legal renews the

arguments in favor of a secondary grant policy made in its comments.

7. *Discussion.* The Commission dismisses the Petition as repetitive and procedurally defective. On alternative and independent grounds, the Commission denies the Petition as meritless and affirms its longstanding one-grant policy, which is supported by the dual rationales of expeditiously granting high-quality applications and limiting administrative burdens.

8. High Quality Applications. The Commission rejects Discount Legal's assertion that the potential disparities between the quality of unsuccessful applicants in an MX group is "irrelevant." The Commission's one-grant policy is designed to encourage the best possible application submissions in every filing window. The current policy creates competitive pressure toward this end because applicants know that only the best application in an MX group will win.

9. The Commission also rejects Discount Legal's argument that "the idea than an applicant must be dismissed because it is comparatively inferior to an unqualified applicant being dismissed" violates the Supreme Court's holding in *Ashbacker Radio Corp. v. FCC*. The Commission previously considered and rejected this argument in a prior decision affirming the one-grant policy and explained that *Ashbacker* "[does not] require the Commission to engage in secondary analyses of inferior applications simply because they do not conflict with the tentative selectee."

10. Administrative Burdens. The Commission rejects Discount Legal's contention that the concern about administrative burdens "does not hold up." Discount Legal does not consider the extensive work required following the issuance of tentative selectee orders. The Commission explains that a tentative selection is not final until the entire administrative process of resolving petitions to deny, and any subsequent pleadings, is complete. Commission review

of any petitions and associated point audits is a weighty and oftentimes lengthy process, requiring extensive analysis to determine the status of every tentative selectee's application and the merits of every petition to deny. If a petition to deny is granted, a new tentative selectee must be chosen, and petitions to deny must again be entertained.

11. The one-grant policy incentivizes applicants to resolve mutual exclusivities through the more expeditious settlement process, thereby accelerating new NCE service to the public. The Commission rejects Discount Legal's argument that it is irrational to allow multiple grants in an MX group in the settlement context but not engage in secondary analysis through the point system. This argument does not account for the fundamentally different nature of the two conflict-resolution methods and the time each process entails.

12. The Commission also rejects the argument that secondary grants would better accomplish the section 152 and 303(g) statutory objectives of efficient and effective radio use. The Commission explains that simply granting as many applications as possible in any given window will not result in greater long-term efficiency and effectiveness. Rather, the one-grant policy better serves the policy goals of sections 152 and 303(g) by incentivizing better applications as well as cooperative settlements that encourage more intensive and higher quality use of spectrum.

13. Established One-Grant Policy. Finally, the Commission's rejects Discount Legal's argument that the one-grant policy was not endorsed by the Commission, but rather, originated with the Bureau staff. The Commission explains that Discount Legal's characterization is directly at odds with the Commission's explicit mandate in the 2001 *NCE Comparative MO&O*, the subsequent Commission decisions stating that the Bureau correctly applied the *NCE Comparative MO&O*, and the Commission's recent reaffirmation of the one-

grant policy in the *2019 Report and Order*. These decisions reflect that it has been, and remains, the resolve of the Commission—not the staff—that the Bureau process applications based on a “one-grant” policy.

ORDERING CLAUSES

14. IT IS ORDERED that the Petition for Reconsideration filed on March 12, 2020, by Discount Legal IS DISMISSED, and alternatively and independently, IS DENIED.

15. IT IS FURTHER ORDERED that should no further petitions for reconsideration or petitions for judicial review be timely filed, MB Docket No. 19-3 SHALL BE TERMINATED, and its docket CLOSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene Dortch,

Secretary.